IN THE

Supreme Court of the United States

FEBRUARY TERM, 1942.

EDWARD L. CORBETT,
Petitioner,

vs.

LILLIAN J. HALLIWELL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit does not appear to be as yet officially reported. It is dated November 19th, 1941 and appears in this record (ff. 256, 259).

The aforesaid opinion was withdrawn and corrected on the court's own motion on December 18th, 1941. The corrected opinion is also part of this record (ff. 260-262).

II.

Jurisdiction.

The date of the judgment or decree of the United States Circuit Court of Appeals for the Second Circuit is November 10th, 1941. This decision was withdrawn on the

court's own motion and a corrected opinion filed on December 18th, 1941 (f. 260).

The 38th Rule, paragraph 5 (b) of the Revised Rules of this Court provides that where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; where it has decided an important question of general law in a way probably untenable, or in conflict with the weight of authority, or has decided an important question of federal law which has not been, but should be, settled by this Court, a writ of certiorari will be granted by this Honorable Court. At pages 7 to 10 hereof, is set forth a concise statement particularly disclosing the basis and grounds on which it is contended that this Court has jurisdiction to review the judgment or decree of the Court below and the grounds on which the jurisdiction of this Honorable Court is invoked, and it is deferentially submitted that the foregoing reasons bring the petition herein within the aforementioned Rule; these in the interest of brevity, are not repeated here.

It is specifically pointed out, however, at this time, that the Circuit Court of Appeals for the Second District, in affirming the judgment below, has rendered a decision in direct conflict with the decision of another Circuit Court of Appeals on the same matter, to wit: the Circuit Court for the Seventh District (Oregon).

The Circuit Court for the Second District held that although she availed herself of the services of the plaintiff, defendant never intended to compensate plaintiff for said services, and that this reservation in the mind of defendant should have been known to plaintiff. Accordingly, judgment must be rendered for the defendant. It is noted that there was no finding that the plaintiff acquiesced in the assumption existing in defendant's mind that he should serve without compensation.

On this point, this decision is in conflict with the decision of the Circuit Court for the Seventh District

(Oregon), where in a similar case, it held that in availing itself of the services of plaintiff, while defendant never intended to compensate plaintiff, and even though this fact was known to the plaintiff, nevertheless, the latter should recover as he himself did not acquiesce in the arrangement.

III.

Statement of the Case.

This is an action at law instituted by the plaintiff, an attorney, for the value of professional services rendered at the request of the defendant. In brief, plaintiff contends that his professional advice and help was sought out by the defendant in connection with her complicated legal difficulties involving her husband and his property, running into millions of dollars. On the other hand, she contends that while in denying the request for, and the rendering of, the legal services, she has assumed that they were rendered without expectation of compensation and based on friendship.

This action was tried in the United States District Court for the State of Connecticut, without a jury. The trial judge made considerably detailed findings of facts. He divided these findings into two groups: one which would tend to support an implied promise of compensation on the part of the defendant, and the other which would tend to negative such an implied promise (ff. 740-743; 743-749).

In the first group, he found facts based largely on written documents and documentary evidence, the main features of which may be summed up as follows:

1. That defendant disclosed and discussed with plaintiff all her complicated, difficult and important legal diffi-

culties with her husband, and concerning his property, measured in millions.

2. She specifically, and in writing, asked for an opinion from plaintiff concerning the advisability of accepting a proposed settlement.

3. She arranged successive appointments about ten in number, by telephone, letters, and telegrams.

4. Upon her husband serving her with a summons and complaint in Connecticut, in an action designed to obtain sole control of his property, she made a trip to New York, and delivered this summons and complaint to the plaintiff at his office.

5. She was instrumental in arranging conferences between plaintiff and her Connecticut counsel, and other counsel in the case.

6. She had knowledge that plaintiff was engaged in drafting pleadings and memoranda of law concerning her affairs (ff. 740-743).

As against the foregoing findings, as stated above, based mostly on written evidence, we have the second group of findings, which, in the mind of the trial judge, justified a judgment for the defendant. At the outset, we see that these findings begin with such intangible matters as what "plaintiff knew", and what the defendant "also assumed". These findings continue in regard to "impressions created", and concern themselves with "imperceptible shifts"—all matters that lie within conjecture and secondary inferences (ff. 743-749).

It must be readily seen that the facts found to support the judgment do not compare in any way as to weight, definiteness, and as to a solid foundation with the facts found, that would tend to support a judgment for the

plaintiff. These facts, as we have seen, are supported by written documents, among them, the original summons and complaint in the hands of the plaintiff, and now among the exhibits in this case.

The theory of this appeal is that the trial court having found, as it did, that defendant has solicited plaintiff's legal advice, that having supplied him with the documents on which to base this advice, and plaintiff, on his part, having rendered the service asked of him, defendant shall not now be heard to say that she had a right to assume that she need not compensate for the work she asked for, and that the plaintiff knew of her intention never to pay him. The weight of authority on the subject of implied contracts holds that in requesting the rendition of work, a corresponding obligation to pay therefor, will be ordinarily implied. While it is true that under some circumstances, such a promise will not be implied, yet it has never been held that a private reservation in one's mind not to pay, is one of the factors to be considered. Nor is it material that the offeree had knowledge of this private reservation, providing, he, by his own word or conduct, did not acquiesce to such a reservation.

There has been a decision in another Circuit Court of Appeals, where it was found that the corporate defendant gave no express promise of compensation. Moreover, it never had an intention to compensate plaintiff for the services he rendered, and above all, plaintiff knew at the time the services were rendered, that the defendant had no intention to pay. Yet, it was held on those facts that plaintiff was entitled to compensation for the services he performed at the request of the defendant, since he never expressly or otherwise, acquiesced in defendant's intention not to pay, and that whatever he may have contributed to this intent of defendant by his silence, was more than matched by the similar silence of the defendant in the face of the ordinary presumption that valuable services should be paid for.

To the extent of the foregoing, then, there is a conflict in the statement of the law of implied contracts by the Circuit Court below, and the Circuit Court for the Seventh Circuit (Oregon).

IV.

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that the findings not being "clearly erroneous", the judgment must be affirmed where the findings and specifically, the primary facts, found, do not support the judgment, and although some of the findings of ultimate facts tend to support the judgment, these are not binding on the appeal, for the Circuit Court of Appeals could draw its own conclusions.

2. The Circuit Court below unnecessarily and unreasonably restricted the scope of the review on appeal where, it held originally that it affirms the judgment since it appears that the findings are "not unsupported by any evidence", and in the revised opinion, where the reason it gave was that the findings "are not clearly erroneous". A much fuller and comprehensive review of the facts could be, and should be had and afforded to the petitioner where, as here, a substantial portion of the evidence is written, from which the appellate court may draw, and should draw, its own conclusions, and where, as here, the petitioner concedes the primary findings of facts, but submits that the appeals court can, and should, draw its own inferences as to ultimate facts.

3. The rule of law as stated in the opinions below, both the original and the corrected opinions, appears to be against the weight of authority, that holds the true test of implied contracts to be what a reasonable person would

act on, and not, as stated in the opinion below, the test of what defendant individually, and what the plaintiff individually, believed, regardless of whether or not their conduct would be reasonable.

4. In holding that plaintiff should not recover since he knew that defendant had no intent to pay there was error since by the weight of authority, valuable services should be compensated for, and the fact that the defendant had a reservation not to pay, even if known to the plaintiff, is not binding on the latter, provided he, by his own conduct or word does not acquiesce in such an intent.

V.

Summary of the Argument.

1. The primary facts found by the trial judge, together with the facts found based upon written evidence available to be examined on appeal, necessarily point to judgment for the plaintiff.

2. The ordinary presumption that valuable services should be compensated was not overcome by the facts found by the trial judge.

3. The test of whether a contract of compensation should or should not be implied ought to be based on the ordinary conduct and expectations of reasonable persons.

4. A reservation in defendant's mind not to compensate plaintiff even though known to plaintiff, is not binding on the latter, provided he does not encourage or contribute to same by his own word or conduct.

VI.

ARGUMENT.

POINT I.

The primary facts found by the trial judge, together with the facts found based upon written evidence available to be examined on appeal, necessarily point to judgment for the plaintiff.

The defendant argued in the court below that the trial judge, having decided a question of fact, the same could not be reviewed on appeal, having in mind the opportunity to see and hear the witnesses, which opportunity is not present on the argument of an appeal.

This argument was reflected in the opinion of the Circuit Court below in stating in the first instance, that "findings of fact have the same effect as the verdict of a jury", and "we are satisfied that the findings are not unsupported by any substantial evidence". It can be readily seen that a yardstick of findings being, or not being "unsupported by any substantial evidence" may be satisfied in almost any case by a simple verbal denial by any defendant of any material allegation of plaintiff's case (f. 257).

In the corrected opinion below, it was stated that the findings being "not clearly erroneous", the judgment must be affirmed (f. 261). This too, casts an unnecessarily heavy burden upon any litigant in a civil case where the issues should be decided by a preponderance of evidence, if possible. The question of having a full hearing *de novo* on appeal, as against the view of a restricted hearing on account of the lack of opportunity to see and hear witnesses, has long been a point of contention. It cannot but be conceded that while the former is desirable, from the point of view of fairness and justice to the litigant,

the latter is often necessitated by the nature of an appeal based on the written word.

In all instances, however, where the evidence was based on other than the lips of witnesses, the appellate courts have consistently held, that the right to review should be full, that the facts found can be examined *de novo,* and that the reviewing court could draw its own conclusions and inferences therefrom.

Also, where the facts found, at least the primary facts found, by the trial court are conceded on the appeal, the appellate court is free to draw its own conclusions therefrom, and is not bound by the findings of ultimate facts below.

> "Where there is no conflict of evidence, and a finding by the district court is a conclusion from admitted facts, there is no presumption in favor of its correctness in the appellate court."
>
> *Dunn* v. *Trefry,* 260 Fed. 147, 148.

> "We recognize the rule that where there is a conflict of testimony, and the credibility of witnesses is involved, the findings of the district court is not to be disturbed, unless it is clearly wrong. But where, as here, these circumstances are not present, and the finding is a conclusion from admitted facts, we do not think the rule applies."
>
> *Dunn* v. *Trefry* (*Supra*).

In the case at bar, the trial court made detailed findings of fact as follows:

> "In her successive conferences with the plaintiff, the defendant disclosed in great detail such evidence as she had relating to her husband's character and financial circumstances and supplied him with copies

of the trust indentures referred to above and later with copies of proposed settlements with her husband, as negotiated by her Connecticut counsel" (f. 740). Appellant concedes this.

"In this latter connection she wrote to the plaintiff (Exhibit 15) with respect to one proposed settlement as follows: 'What shall I say in regard to the proposals, if Mr. Foord or Mr. Carmody should call me? I think they are anxious to know what I will accept. Please help me with this'" (f. 741). Appellant concedes this.

"The plaintiff frequently reported to the defendant by letter, telephone and interview his activities in her behalf, including inquiries made by him in Washington, D. C., relative to her husband's personal life, inquiries made of the trustee under the indentures referred to as to the amount and status of trust estates in which her husband had interests, one or two conferences with her husband's New York counsel, inquiries as to a suitable school for the defendant's daughter in Switzerland and her instruction in the harp, and inquiries made as to the suitability of a trade name for a business in which her son was interested" (f. 741). Appellant concedes this.

"When the defendant in December, 1937, was served with notice of her husband's suit described in Paragraph 5 above, instead of turning the papers which had been served upon her over to her Connecticut counsel, accompanied by Mr. Foord she brought the papers to the plaintiff in New York" (f. 742). Appellant concedes this.

"She knew that plaintiff had furnished Mr. Foord with a memorandum of law and herself received from the plaintiff a draft of answer to the complaint in the

New York suit,—believed by the plaintiff adapted to protect the defendant's interests in the exigencies which had arisen and thereafter requested plaintiff to accompany her to a conference with Coudert Brothers'' (f. 743). Appellant concedes this.

As against the above findings, the Court further found facts set forth at length, which show the tendency to negative the exigencies of an implied promise of compensation. It would serve no useful purpose to go into the evidence, or lack thereof, sustaining these findings (ff. 743-749). It appears, however, on their face even, that for the most part, they are expressions of inferences from facts, purely collateral to the real issue involved herein; to wit: having asked for, and received, the legal services of an attorney, was she not correspondingly bound in consequence, to compensate therefor? Of course, the appellate court is not bound by these inferences, but may draw its own conclusions from the primary facts found. The recital of social relations is a finding of primary fact, but the further finding that, in view of such social relations, the defendant could reasonably assume that plaintiff was rendering his services without expectation of compensation, is an inference that may be, and should be, reviewed on this appeal. On such a review, of course, this Court would not be bound by the ultimate findings below, but may decide *de novo* whether or not such a conclusion is reasonable in view of the primary facts found.

On this question, petitioner wishes to make a brief reference to the exhibits which are a part of this record, specifically the following:

Exhibit 7: letter written by the defendant to the plaintiff at the latter's law office:

> ''* * * I will call you Saturday morning at eleven o'clock (11 A. M.) at your office.''

Exhibit 9: letter written by the defendant to the plaintiff at his office:

> "I would like to see you Friday of this week about 11 A. M. if this is convenient.
>
> "If this date is not convenient, will you please telephone me, if I should make it next Monday, the 1st of Nov."

Exhibit 15: letter written by defendant to plaintiff, addressed to his law office:

> "What shall I say in regard to the proposals, if Mr. Foord or Mr. Carmody should call me. I think they are anxious to know what I will accept. Please help me with this."

Exhibit 15: telegram sent by the defendant to the plaintiff at his law office:

> "* * * Will call you for appointment * * *"

Exhibit 19: telegram sent by the defendant to the plaintiff addressed to his law office:

> "* * * will be at your office tomorrow noon * * *"

It is well settled that this Court is not bound in any way by the conclusions reached by the trial court from the foregoing exhibits, but may draw its own conclusions as to the meaning of the foregoing written evidence. Was the foregoing correspondence part of a mere social relationship, or was their nature such that a contract implying compensation for the services sought, may be, and should be, inferred therefrom? It is respectfully submitted that on this point, this Court is by no means bound to follow the decision reached below.

It was held in *Kaeser & Blair, Inc.* v. *Merchants' Association,* 64 Fed. 2nd, 575, 576 as follows:

> "The finding of unfair competition was based upon exhibits introduced in evidence. This court, therefore, cannot give to the finding the weight that attaches to a finding of fact where the court has heard witnesses in open court, but must draw its own deductions and conclusions from an exhibition of the exhibits."

POINT II.

The ordinary presumption that valuable services should be compensated was not overcome by the facts found by the trial judge.

The applicable law may be found in A. L. I. Restatement of Contract, of which the following sections are relevant:

"Section 5. *How a promise may be made.*

Except as stated in Section 72 (2) a promise in a contract must be stated in such words whether oral or written, or must be inferred wholly or partly from such conduct, as justifies the promisee in understanding that the promisor intended to make a promise.

Example: A telephones to his grocer, "Send me a barrel of flour." The grocer sends it. A has thereby contracted to pay a reasonable price therefore."

Section 72 (1A): Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.

Section 91A: "Silence may be so deceptive that it may become necessary for one who receives beneficial services to speak in order to escape the inference of a promise to pay for them. It is immaterial in this connection whether the services are requested and the silence merely relates to an understanding to pay for them or whether the services are rendered without a preliminary request with knowledge on the part of the person receiving them that they are rendered with the expectation of payment. In either case the ordinary implication is that the services are to be paid for at their fair value."

Also Williston on Contracts, Section 36: An offer need not be stated in words. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act by the offeree amounts to an offer."

See the opinion of Marshall, J., in *Wojahn* vs. *National Union Bank,* 144 Wis. 646, 667, 129 N. W. 1068;

> "The general rule is that if a person performs valuable services for another at that other's request, the law implies as a matter of fact the making of a promise by the latter and acceptance thereof by the former to pay the one performing the service or the reasonable value thereof (citations) * * *"

The burden of refuting this ordinary presumption to compensate for services rendered, was not met by the defendant. The facts found in regard to the correspondence showing plaintiff's solicitude concerning the education and other affairs of defendant's children, cannot be construed as an offer to render services as a matter of friendship.

The most favorable inference that may be drawn for the proof adduced by the defendant, and the findings based thereon, is that plaintiff's concern with her general

family affairs created a hope in her mind that his services may be rendered as a matter of friendship. In fact, defendant's testimony is to the same effect (f. 482; f. 494; f. 513; f. 608; f. 628). The test, however, is not based upon what defendant herself has hoped for; for surely no reasonable person would assume that an attorney would handle weighty and most complicated legal matters involving control of millions of dollars without compensation, without an express understanding to that effect. No reasonable person would assume an attorney to undertake the defense of an action designed to gain control of trust funds involving over three millions of dollars, purely on the basis of friendship, evidenced by a few personal inquiries and one or two luncheons, especially without any previous contact or blood-relationship or friendship.

As we have seen above, the test of whether there was or was not an implied contract should not have been based on the assumption of this particular defendant, ill-founded as it may be, but solely upon what a reasonable person might have assumed under the circumstances. Insofar as the foregoing are concerned, the holdings of the courts below are in error as far as the ultimate facts were found, the inferences based thereon, and the statement of the law to be applied.

POINT III.

The test of whether a contract of compensation should or should not be implied ought to be based on the ordinary conduct and expectations of reasonable persons.

The decision of the trial court in the instant case as well as the holdings in the Circuit Court of Appeals below appear to have been based upon what defendant's personal intentions were, and what plaintiff was justified in understanding as to her intentions. The weight of authority, however, appears to be based not so much upon the individual intentions of the parties, but upon the test of what a reasonable person should have intended, or should be deemed to have intended. See Williston on Contracts, Section 36; *Butler* v. *Solomon*, 127 Conn. 36.

In the latter case the Court stated:

> "An implied contract would arise if the plaintiff rendered services at the request of the defendant, under an expectation that they were to be paid for and were rendered under such circumstances that the defendant knew, or *as a reasonable person should have known* that the plaintiff would expect payment."

The point the petitioner wishes to make is the following: a person requesting the legal and professional services of an attorney in a complicated, difficult and valuable legal matter, is deemed, by operation of law, to have contracted to pay suitable compensation for same. Any private reservation to the contrary in defendant's mind is immaterial and should not affect the aforesaid implication, and this, even though such reservation may be known to the plaintiff provided he does not acquiesce therein.

POINT IV.

A reservation in defendant's mind not to compensate plaintiff even if known to plaintiff, is not binding on the latter, provided he does not encourage or contribute to same by his own word or conduct.

This precise point was considered in the United States Circuit Court for the Seventh District (Oregon) in a leading case reported August 8th, 1884, *Hughes* v. *Dundee Mortgage & Trust Company,* 21 Fed. 169. This too, was an action to recover a sum of money for legal services and came before the Appellate Court on exceptions to the findings of fact by the Referee below. The language of the Circuit Court in reversing the findings, and upon such reversal, awarding judgment to the plaintiff for the value of his legal services is so directly applicable to the case at bar, that it has been deemed best to cite it at length:

> " 'But it is also alleged in the answer that it was 'understood' during the time these general services were being rendered that they were performed gratuitously, or in consideration of the fees paid by borrowers. But the understanding a party may happen to have about any matters does not constitute a contract between him and another to that effect. To amount to a contract—*aggregatio mentium*—the understanding must be mutual.'
>
> 'Nor is it material if the plaintiff, as found by the referee, had reason to believe that the defendant understood that by the contract the plaintiff was to perform these general services without charge, so long, at least, as he did not, by sufficient word or deed, cause or authorize such understanding or conclusion.

The finding is therefore immaterial and judgment may be given, notwithstanding it, for the value of the services as found by the referee.'

"While it is true that for 6 years plaintiff rendered such services without an express agreement of compensation, his conduct is more than matched by similar conduct by the defendant.'

'Whenever one person does any work or service for another with his consent, and there is no agreement as to compensation, the law implies a contract, contemporaneous with the doing of the work or service to pay what the same is reasonably worth; and the burden of proof is upon the party who, acknowledging the premise (*sic*) promise, denies the conclusion or undertakes to avoid or prevent this implication by showing that the work or service was performed gratuitously, or included in the compensation made for some other service or thing, as for instance, that the party for whom the work or service is done declared at the time he would not pay for it.' "

To the extent of the foregoing then, the above holding of the Circuit Court for the Seventh Circuit (Oregon), which to the knowledge of this petitioner has never been modified or reversed and therefore is still the law, is in direct conflict with the holding in the case at bar.

The specific point sought to be determined in this appeal is this: is a reservation in defendant's mind not to pay for legal services binding upon the plaintiff? Or on the other hand, is the latter justified in claiming compensation if he did not acquiesce in such reservation. As it stands, the holding in this case is directly opposed to the holding of the other Circuit Court as above cited, and in fact, to the letter and spirit of the weight of authority as expressed in Williston on *Contracts* (*Supra*) and the *Restatement of Contracts* (*Supra*).

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the questions here involved may be permanently settled by this Honorable Court and a proper construction and interpretation made and injustice prevented, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the said United States Circuit Court of Appeals for the Second Circuit, and finally reverse it.

Respectfully submitted,

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